IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9016 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NIRMALABEN @ NIRU DURGAPRASAD KAHAR

Versus

COMMISSIONER OF POLICE

Appearance:

MR SATISH R PATEL for Petitioner

Mr. U.R. Bhatt, AGP for Respondents.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 23/03/98

ORAL JUDGEMENT

By this application under Article 226 of the Constitution of India, the petitioner calls in question the legality and validity of the detention order dated 3rd December 1997 passed by the Police Commissioner for the city of Baroda invoking his powers under Section 3 of the Gujarat Prevention of Anti-Social Activities Act, (for short "the Act").

2. In order to appreciate the rival contentions of the parties, few facts may be stated. Against the petitioner about six complaints of the offences under Section 66(1)(b), 65(e) & 81 of the Bombay Prohibition Act came to be lodged with Raopura police station and Prohibition Police Station in the District of Baroda. As alleged in those cases the petitioner at different times was found in possession of liquor without any pass or permit and the quantity of liquor were ranging from 5 litres to 273 litres. The Police Commissioner, after inquisition, also found that the petitioner being the bootlegger was disturbing the public order by carrying out her subversive activities. He could know that the petitioner was a head-strong woman and by different criminal activities she was terrorising the people. She was extorting money and causing injures and/or damage to the properties through her compeers and causing the people to bend her way so that she could carry out her liquor business without any obstruction and those who refused to succumb to her desire or proposals, they were brutally breaten and harassed. Hence no one was ready to come forward and state against her. After considerable persuasion when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses under great tension stated against her. Thereafter also studying the papers, the Police Commissioner found that the anti-social, subversive and chaotic activities of the petitioner were required to be curbed any how immediately. He however found that any action if taken under the general law sounding dull would be unproductive and it would be of no use as nothing fruitful would be gained. He then thought that the only way out was to pass the order of detention under the Act and detain the petitioner. Accordingly the same has been done.

3. Challenging the order, it is submitted on behalf of the petitioner that there was no justification for the Police Commissioner to pass the impugned order. Even if it is believed for a while that the petitioner was a bootlegger, the same would not be a ground to pass the order in question, in view of the decision of the Supreme Court in the case of Piyush Kantilal Mehta vs. Commissioner of Police, Ahmedabad City & Anr. - AIR 1989 S.C. 491. It is also the submission of the petitioner's learned advocate that without any just cause the particulars of the witnesses were suppressed, with the result the right to make effective representation was jeopardised. The petitioner could not know whether in fact the statements recorded were of those witnesses whose names are suppressed, she was for want of

particulars unable to study those statements and decide whether any defence was available to her. During the course of the hearing, after I made query both the learned advocates have tapered off their submissions confining to the only point namely exercise of privilege under Section 9(2) of the Act. I will, therefore, confine to the only point going to the root of the case.

4. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials

would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

5. In view of such law, the detaining authority was required to file the affidavit and satisfy the court that it was in the public nterest namely to protect the lives of the witnesses certain particulars about those witnesses were required to be kept secret. It is pertinent to note that in this case affidavit justifying the circumstances for the exercise of the privilege under Section 9(2) of the Act is not filed. When that is so, it should be assumed that without any just cause the particulars were suppressed. As the particulars were not given, naturally the petitioner could not know what defence she could take, what were the reasons to state against them and whether in fact those witnesses really stated so or whether they were really in existence. Thus the right to make effective representation is jeopardised. Further, for want of explanatory affidavit, it can be said that there was no just cause for being personally satisfied applying the mind qua the privilege. Thus the requirements of Section 9(2) of the Act are not satisfied and the privilege exercised cannot be said to be just and proper. The order of detention passed is, therefore, bad in law and continued detention is arbitrary and illegal. The same is therefore liable to be quashed.

6. For the aforesaid reasons, this petition is allowed. The order of detention dated December 3, 1997, is quashed and set aside being unconstitutional and illegal and the petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule accordingly made absolute.

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(rmr)